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SYMPOSIUM  
THE AMERICAN CONGRESS:  
LEGAL IMPLICATIONS OF GRIDLOCK

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THE PHENOMENOLOGY OF GRIDLOCK

*Josh Chafetz†*

*Assertions that our legislative process is gridlocked—perhaps even “hopelessly” so—are endemic. So many more of our problems would be fixed, the thinking goes, if only our political institutions were functioning properly. The hunt for the causes of gridlock is therefore afoot.*

*This Essay argues that this hunt is fundamentally misguided, because gridlock is not a phenomenon. Rather, gridlock is the absence of phenomena; it is the absence, that is, of legislative action. Rather than asking why we experience gridlock, we should be asking why and how legislative action occurs. We should expect to see legislative action, the Essay argues, when there is sufficient public consensus for a specific course of action. “Sufficient,” in this context, is determined with reference to our specific constitutional structure. And “public consensus” should be understood dialogically, as a function of political actors’ engagements in the public sphere. In short, before we declare legislative inaction to be evidence of dysfunction, we should first be sure that the conditions sufficient to trigger legislative action in our constitutional regime have been satisfied. Part I spells out these conditions in greater detail.*

*Once we understand what is constitutionally necessary to motivate congressional action, we are then better able to identify true dysfunctionalities. Part II gives an example of a procedural mechanism that does, in fact, prevent legislative action even when the constitutional conditions for action are met: the Senate filibuster. Attentiveness to the ways in which the filibuster plays out in the public sphere—specifically, the high degree of public support for efforts to circumvent the filibuster—demonstrates its democratic dysfunctionality.*

*The conclusion tentatively suggests a few reasons that observers may be perceiving unusually high levels of gridlock today and considers which of these explanations, if correct, would indicate actual institutional dysfunction.*

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† Associate Professor of Law, Cornell Law School. This Essay was originally prepared for the *Notre Dame Law Review*’s 2012 “The American Congress: Legal Implications of Gridlock” Symposium, and I am grateful to the Symposium organizers and participants for their comments. Thanks also to Will Baude, Joseph Blocher, Guy Charles, Maggie Lemos, Marin Levy, David Pozen, Catherine Roach, Justin Zaremby, and the participants in the Duke Law School Statutory Interpretation Colloquium for helpful and thought-provoking comments on earlier drafts. Any remaining errors or infelicities are, of course, my own.

## INTRODUCTION: TWO MIRACLES (AND COUNTING)

Early in the morning of Saturday, September 22, 2012, the miraculous happened. The Senate, by a vote of 62 to 30, passed H.J. Res. 117, a continuing appropriations resolution funding the federal government through March 27, 2013.<sup>1</sup> The House had passed the joint resolution nine days earlier, by a vote of 329 to 91, and President Obama signed it into law on September 28, averting a government shutdown that would have begun at the end of September. This stood in some contrast to early fiscal fights in the 112th Congress—after all, the government was within hours of shutting down in April 2011 before Congress agreed to fund the government through the end of September 2011;<sup>2</sup> then, in August 2011, the government was within hours of exhausting its borrowing power and therefore defaulting on its obligations before Congress agreed to raise the debt ceiling.<sup>3</sup> The compromise raising the debt ceiling included provisions meant to structure future budgets, including the fiscal year 2012 budget<sup>4</sup>—most notably, it created a joint committee tasked with reducing the deficit by at least \$1.5 trillion over ten years<sup>5</sup> and provided for automatic spending cuts split between defense spending and certain discretionary nondefense spending to take effect if Congress did not, by January 15, 2012, pass a joint committee bill reducing the deficit by at least \$1.2 trillion over that time.<sup>6</sup> The joint committee failed to report out a bill,<sup>7</sup> and work on a budget for fiscal year 2012 was fraught, with the government again nearly shutting down at the beginning of October 2011.<sup>8</sup> Finally, after operating under a series of short-term continuing reso-

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1 Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, 126 Stat. 1313 (2012).

2 Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011). For a narrative of the passage, see Jennifer Steinhauer, *2011 Budget Bill with Cuts Is Approved by Congress*, N.Y. TIMES, Apr. 15, 2011, at A1. For analysis, see Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 732-34 (2012).

3 Budget Control Act of 2011, Pub. L. No. 112-25, § 301, 125 Stat. 240, 251-55. For a narrative of the passage, see Jennifer Steinhauer, *Debt Bill Signed, Ending Crisis and Fractious Battle*, N.Y. TIMES, Aug. 3, 2011, at A1. For some intriguing thoughts on the debt ceiling standoff and the president's constitutional options, see Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012).

4 See David Lauter, *For All the Drama, Little Got Done*, L.A. TIMES, Aug. 2, 2011, at A1 (discussing the deal's \$21 billion in cuts to the 2012 budget, its creation of a congressional supercommittee to find an additional \$1.2 trillion in cuts over the next decade, and the cuts that would automatically take effect if the committee failed to come up with a plan or gain passage for it).

5 Budget Control Act of 2011 § 401(b)(2).

6 *Id.* at § 302.

7 See Jennifer Steinhauer, *Facing Billions in Automatic Cuts, Pentagon Pondering Its Next Move*, N.Y. TIMES, Nov. 23, 2011, at A20.

8 See Jennifer Steinhauer, *Senate and House Face an Impasse on Spending*, N.Y. TIMES, Sept. 24, 2011, at A13.

lutions,<sup>9</sup> Congress in November and December of 2011 passed appropriations bills for the remainder of the fiscal year.<sup>10</sup> This series of events was largely responsible for the new conventional wisdom that Congress is hopelessly gridlocked. Congressional scholars Tom Mann and Norm Ornstein, having titled their previous book *The Broken Branch*,<sup>11</sup> named their new best-seller *It's Even Worse Than It Looks*.<sup>12</sup> (One presumes that their next project is simply titled *Doom!*) The *Washington Post's* Ezra Klein referred to the 112th Congress as the "worst Congress ever."<sup>13</sup> And the same sentiment is likely responsible for the existence of this Symposium in the first place.<sup>14</sup>

How, then, did the Miracle of September 2012 happen? The answer is simple. As the *New York Times* put it, given the fight's proximity to the November 2012 elections, "Republican[ ] leaders were eager to avoid a government crisis that voters at the polls could blame them for."<sup>15</sup> Reuters concurred, noting that Republicans backed off demands for larger cuts "to avoid the risk of a nasty shutdown fight that could hurt their party's election prospects in November."<sup>16</sup> And the *Washington Post* observed that the impetus to avoid a shutdown in the run-up to the election was bipartisan: "The quick resolution demonstrated that neither party wants a major budget showdown weeks before the November election."<sup>17</sup> Indeed, the *Times* noted that mem-

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9 Continuing Resolution, Pub. L. No. 112-68, 125 Stat. 770 (funding the government through Dec. 23, 2011); Continuing Resolution, Pub. L. No. 112-67, 125 Stat. 769 (2011) (funding the government through Dec. 17, 2011); Continuing Appropriations Act, 2012, Pub. L. No. 112-36, 125 Stat. 386 (2011) (funding the government through Nov. 18, 2011); Continuing Appropriations Act, 2012, Pub. L. No. 112-33, 125 Stat. 363 (2011) (funding the government through Oct. 4, 2011).

10 Disaster Relief Appropriations Act, 2012, Pub. L. No. 112-77, 125 Stat. 1277 (2011); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552 (2011).

11 THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH* (rev. ed. 2008).

12 THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* (2012).

13 Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST WONKBLOG (July 13, 2012, 8:00 AM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/13/14-reasons-why-this-is-the-worst-congress-ever/>.

14 This view is apparent in, for example, Michael Teter's contribution to the Symposium, which dramatically begins, "Gridlock has Congress in a headlock. Gripped by stalemate, America's chief lawmaking body can barely muster the ability to make law." Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013).

15 Jennifer Steinhauer, *Leaders Reach Tentative Deal on Spending to Avoid Fight Before Election Day*, N.Y. TIMES, Aug. 1, 2012, at A11.

16 David Lawder, *US Congress Passes Stop-Gap Six-Month Funding Measure*, REUTERS (Sept. 13, 2012, 7:01 PM), <http://www.reuters.com/article/2012/09/13/usa-congress-shutdown-idUSL1E8KDHD120120913>.

17 Rosalind S. Helderman, *Congressional Leaders Reach Spending Accord*, WASH. POST, Aug. 1, 2012, at A3; see also Jonathan Weisman, *Congress Heads for Home with Rancor Still Evident*, N.Y. TIMES, Sept. 22, 2012, at A13 ("In the end, both parties were more interested in avoiding a debilitating showdown that might have shut the government down just before the election.").

bers of both parties, but especially Republicans, markedly changed their rhetoric from partisan obstructionism to bipartisan cooperation as the election neared.<sup>18</sup> And this change in tone was apparent not only on the campaign trail, but also in members' voting patterns.<sup>19</sup> Even House Majority Leader Eric Cantor—not generally known as the compromising sort<sup>20</sup>—described his chamber's overwhelming bipartisan vote for the JOBS Act<sup>21</sup> in March 2012 as follows: "We are in an election season, and the test for any candidate is whether they can produce results."<sup>22</sup> The reason for this shift "is not hard to explain. [A poll] showed that 44 percent of Americans see Republicans at fault for gridlock in Washington, compared with 29 percent who blame President Obama and the Democrats. Nineteen percent said both were to blame. That imbalance has persisted at almost exactly those proportions since last year."<sup>23</sup> Predictably, the Democratic response has been to push back, accusing Republican members of hypocrisy in their newfound bipartisan rhetoric.<sup>24</sup> As the *Times* wryly noted, "For candidates with long political histories, the record can be inconvenient."<sup>25</sup> And where there are competitive elections, there are those with the resources and incentives to dig into candidates' records.

And then it happened again—a second legislative miracle, occurring late in the evening of January 1, 2013. The draconian automatic spending cuts put into place in mid-2011 as an incentive to Congress to pass more palatable deficit reduction had (as noted above) failed to achieve their goal,<sup>26</sup> and the cuts had accordingly taken effect with the ringing in of the new year. Simultaneously, the Bush tax cuts expired in their entirety; the confluence of spending cuts and tax increases came to be known as "the fiscal cliff." With the nation only slowly recovering from the "Great Recession" of 2007–09, there was widespread concern that this combination, if allowed to persist, would severely curtail economic growth in 2013, perhaps even pushing the nation back into recession.<sup>27</sup> President Obama had

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18 Jennifer Steinhauer & Jonathan Weisman, *Some Republicans Try Out a New Campaign Theme: Bipartisanship*, N.Y. TIMES, Sept. 16, 2012, at A18.

19 *Id.* ("Some of the moderation has extended to legislation.").

20 Mann and Ornstein describe Cantor as "especially resistant to the idea of swallowing hard and accepting the responsibility that comes with being in the majority." MANN & ORNSTEIN, *supra* note 12, at 10. *But see* Jonathan Weisman, *G.O.P.'s Cantor, Looking Past Politics of Debt*, N.Y. TIMES, Jan. 28, 2013, at A1 (noting that Cantor's tone seems to have softened in the wake of the 2012 elections).

21 Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

22 Jonathan Weisman, *With November in Mind, House Passes a Jobs Bill*, N.Y. TIMES, Mar. 9, 2012, at A16. *See also id.* ("Republican leaders were open about the political pressure that was driving them toward bipartisanship.").

23 Steinhauer & Weisman, *supra* note 18.

24 *See id.*

25 *Id.*

26 *See supra* text accompanying notes 3–8.

27 *See, e.g.,* Nelson D. Schwartz, *Experts Forecast the Cost of Failure to Compromise*, N.Y. TIMES, Dec. 31, 2012, at B1 ("In the event no compromise is found, however, the Congressional Budget Office and many private economists warn that the sudden pullback in spend-

insisted for some time that he would not sign a bill that extended the tax cuts for wealthy Americans;<sup>28</sup> a majority of House members (and a substantial minority of Senators) had publicly pledged never to raise taxes.<sup>29</sup> And yet, late in the evening on New Year's Day—after the nation had technically gone over the “cliff,” but before any actual damage had been done—the House, by a comfortable 257 to 167 margin, passed the American Taxpayer Relief Act of 2012.<sup>30</sup> The Act, which had passed the Senate by an 89 to 9 vote the previous evening, made permanent the Bush tax cuts on individuals earning less than \$400,000 and households earning less than \$450,000; allowed the cuts to expire for those exceeding those income thresholds; extended a series of tax breaks for low-income Americans; extended federal unemployment insurance; extended business tax breaks for activities including research and development and renewable energy investment; pushed back the automatic spending cuts by two months; and contained a number of other, smaller provisions.<sup>31</sup>

In other words, President Obama and congressional Democrats got a law that raised taxes on the wealthy (although the income threshold was higher than their preferred position<sup>32</sup>), did not significantly cut spending, and contained some amount of economic stimulus aimed at assisting low-income individuals and other traditionally liberal spending priorities. Why did Republicans—the *exact same* Republicans who had spent the previous two years resolutely opposing any tax increases and demanding spending cuts<sup>33</sup>—agree to a deal with tax increases and no real spending cuts?<sup>34</sup> The

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ing and the rise in taxes would push the economy into recession in the first half of the year.”).

28 See, e.g., Helene Cooper & Jonathan Weisman, *Obama to Insist on Tax Increase for the Wealthy*, N.Y. TIMES, Nov. 10, 2012, at A1.

29 See Jeremy W. Peters, *For Tax Pledge and Its Author, A Test of Time*, N.Y. TIMES, Nov. 20, 2012, at A1.

30 Pub. L. No. 112-240, 126 Stat. 2313 (2013).

31 *Id.* For a handy summary of the provisions, see Suzy Khimm, *Your Fiscal Cliff Deal Cheat Sheet*, WASH. POST WONKBLOG (Dec. 31, 2012, 11:26 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/31/your-fiscal-cliff-deal-cheat-sheet/>.

32 This led to no small amount of grouching from the left. See Peter Baker, *On the Left, Seeing Obama Giving Away Too Much, Again*, N.Y. TIMES, Jan. 2, 2013, at A12. For responses, see Michael Grunwald, *Obama and the Liberals: Three Quarters of a Loaf is Never Enough*, TIME MAG. SWAMPLAND (Jan. 9, 2013), <http://swampland.time.com/2013/01/09/obama-and-the-liberals-three-quarters-of-a-loaf-is-never-enough/>; Michael Tomasky, *Dear Liberals: Stop Complaining*, DAILY BEAST (Jan. 3, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/01/03/dear-liberals-stop-complaining.html>.

33 The fiscal cliff deal was the final piece of legislation passed by the 112th Congress; the 113th had not yet been seated.

34 See John Bresnahan et al., *The Fiscal Cliff Deal That Almost Wasn't*, POLITICO (Jan. 2, 2013, 12:21 AM), <http://www.politico.com/story/2013/01/the-fiscal-cliff-deal-that-almost-wasnt-85663.html>:

The bipartisan package allows taxes to rise on American households for the first time in a generation, marking a 180-degree Republican shift from the 2011 debt limit showdown when the GOP balked at closing corporate jet loopholes worth a

answer is complicated; Republicans and liberal critics of the deal of course noted that Republicans would have other chances to extract concessions in the future. Indeed, Senator Lindsey Graham beseeched his Republican colleagues in the House to pass the tax bill and “[s]ave your powder for the debt ceiling fight.”<sup>35</sup> Having saved their powder, however, House Republicans opted not to use it for the debt ceiling fight, either: Early in the 113th Congress, they agreed to suspend the ceiling without any significant concessions from Democrats.<sup>36</sup> Republicans also contended that, since the Bush tax cuts had been slated to expire anyway, they did not really vote for a tax increase; they simply voted for many, but not all, of the tax cuts to be renewed.<sup>37</sup> But these were both clearly arguments meant to mitigate an unpalatable policy outcome; there can be little doubt that, if most Republicans had had their way, things would have been dramatically different. Indeed, one account described the ultimate deal as the “worst of all worlds” for House Republicans: “They failed to save tax cuts for the wealthiest Americans [and] put no new checks on government spending . . . .”<sup>38</sup> Existing checks on spending did come into play: In the face of a largely indifferent public,<sup>39</sup> the automatic

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couple billion dollars. The bill is a wild swing: It raises revenue by \$620 billion and cuts spending by only \$12 billion.

35 Bobby Cervantes, *Lindsey Graham: Save Fight for Debt Ceiling*, POLITICO (Jan. 1, 2013, 10:31 AM), <http://www.politico.com/story/2013/01/lindsey-graham-save-fight-for-debt-ceiling-85646.html>.

36 No Budget, No Pay Act of 2013, Pub. L. No. 113-3, 127 Stat. 51 (2013); *see also* Jonathan Weisman, *House Vote Sidesteps an Ultimatum on Debt*, N.Y. TIMES, Jan. 24, 2013, at A1.

37 Indeed, low-tax advocate Grover Norquist claimed that a vote for the deal did not violate members’ pledges against raising taxes. Lisa Mascaro & Kathleen Hennessey, *Fiscal Cliff Plan Clears House with GOP Divided*, L.A. TIMES, Jan. 2, 2013, at A1. Other influential conservative groups disagreed, *see id.*, and one cannot help but suspect that Norquist was at least partially motivated by a desire not to be seen as having lost influence, once it was clear that passage of the bill was a *fait accompli*.

38 John Aloysius Farrell et al., *The GOP’s Failed ‘Plan O’: Inside the Fiscal-Cliff Saga*, NAT’L J. ONLINE (Jan. 2, 2013, 10:10 AM), <http://www.nationaljournal.com/congress-legacy/the-gops-failed-plan-o-inside-the-fiscal-cliff-saga-20130102>.

39 *See* Halimah Abdullah, *Suffering from Sequester Burnout? You’re Not Alone*, CNN.COM (Feb. 28, 2013, 3:54 PM), <http://www.cnn.com/2013/02/28/politics/sequester-meh> (“Americans appear indifferent to the ‘sky-is-falling’ rhetoric out of Washington with no congressional deal in sight ahead of Friday’s deadline to avert the mandatory austerity.”); Eric Schulzke, *Obama Turns to Charm Offensive to Counter Public Indifference of Budget Sequester*, DESERET NEWS (Salt Lake City) (Mar. 13, 2013, 10:34 AM), <http://www.deseretnews.com/article/865575616/Obama-turns-to-charm-offensive-to-counter-public-indifference-of-budget-sequester.html> (“[A n]ew poll shows that most Americans remain unconvinced that the automatic budget cuts that kicked in last week will negatively impact their lives or the economy as a whole.”). Moreover, unlike some previous fiscal brinksmanship, the implementation of the spending cuts did not send the markets into a tailspin. *See* Nelson D. Schwartz, *Economy Rolls Along, Despite Cuts and Taxes*, N.Y. TIMES, Mar. 16, 2013, at B1 (noting that the stock markets have been hitting new highs, despite the cuts).

spending cuts took effect in March.<sup>40</sup> However, at about the same time, House Republicans preempted a much larger showdown by agreeing, with plenty of time to spare, to a continuing resolution funding the government for the remainder of the 2013 fiscal year.<sup>41</sup> Overall, it is clear that the policy terrain shifted significantly in the Democrats' favor.

Once again, the reason for the policy shift has less to do with the interaction among the political actors involved—after all, they were largely the same as they had been since early 2011—than it does with their interactions with the public. Simply put, the election clarified things, making it clear where the public's affections currently lay. Not only did the President handily win reelection, but the Democrats also increased their margin in the Senate (despite having to defend more seats than Republicans did) and decreased the Republican margin in the House. Because issues of taxing and spending had been so central to the campaigns, Democrats could plausibly claim a mandate for their positions on these issues.<sup>42</sup> Indeed, even before the election, House Speaker John Boehner had drafted a speech, to be delivered only in the event of an Obama victory, in which he agreed to new tax revenue,<sup>43</sup> and other Republicans voiced similar views in the election's aftermath.<sup>44</sup> Nor did the campaigning end with the election: Obama continued making a vigorous public case for tax increases on the wealthy, with numerous public, staged events.<sup>45</sup> He also made it clear to Republican leaders that

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40 See Annie Lowrey, *As Automatic Budget Cuts Go Into Effect, Poor May Be Hit Particularly Hard*, N.Y. TIMES, Mar. 4, 2013, at A13.

41 Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198 (2013).

42 See, e.g., Jackie Calmes & Peter Baker, *Back to Work: Obama Greeted by Looming Fiscal Crisis*, N.Y. TIMES, Nov. 8, 2012, at A1:

If Mr. Obama got a mandate for anything after a campaign in which he was vague on second-term prescriptions, he can and will claim one for his argument that wealthy Americans like himself and his vanquished Republican rival, Mitt Romney, should pay higher income taxes. That stance was a staple of Mr. Obama's campaign stump speeches for more than a year. And most voters, in surveys of those leaving the polls on Tuesday, agreed with him.

Indeed, in mid-December, when Speaker Boehner indicated that he was amenable to an offer Obama had made during the 2011 debt ceiling fight, which would have raised revenue without raising tax rates, Obama "refused, believing his strong electoral victory had altered the political landscape." Bresnahan et al., *supra* note 34; see also Farrell et al., *supra* note 38 ("Obama conceded moving left, but argued the election had changed the political landscape.").

43 See Farrell et al., *supra* note 38.

44 See, e.g., Brian Knowlton & Jackie Calmes, *Obama and Boehner Meet, Raising Hopes*, N.Y. TIMES, Dec. 10, 2012, at A16; Jonathan Weisman, *Congress Sees Rising Urgency on Fiscal Deal*, N.Y. TIMES, Nov. 9, 2012, at A1.

45 See Farrell et al., *supra* note 38 (noting that Obama "took to Twitter to encourage people to express themselves about the upcoming tax hikes" and that he held events in Virginia and Michigan). As Valerie Jarrett, one of Obama's top advisers, put it, "One way of keeping Congress accountable is this constant engagement with the American people, and I know that's something he's committed to doing even more so in a second term."



he was prepared to use both his Inaugural Address and his State of the Union Address in January and February 2013 to attack them on this issue, if a deal was not reached.<sup>46</sup> As some observers noted, in early December, "Obama was using his bully pulpit to win the public opinion fight, holding campaign-style events in key states and aggravating Republicans. . . . Republicans began to fret about losing the PR fight."<sup>47</sup> Key conservative interest groups began to drop their opposition to higher taxes on the wealthy.<sup>48</sup> And poll after poll indicated that the public was, broadly speaking, on the Democrats' side and would blame the Republicans for any failure to strike a deal.<sup>49</sup> It was in the context of this political environment—one in which the public demanded a deal and largely supported the Democratic vision of what such a deal should look like—that a deal, largely favorable to Democratic priorities, was passed.<sup>50</sup> By contrast, where there was no clear public demand for a deal—as with the automatic spending cuts that came into effect in March 2013<sup>51</sup>—then no deal was reached.

In short, a fall 2012 government shutdown was averted and a winter 2013 compromise on taxes was reached (and smaller bills like the JOBS Act were passed) because many members of Congress (and especially members of the leadership) perceived the alternative as unacceptably politically risky.<sup>52</sup> They perceived that there was a public appetite for certain pieces of legislation, and they moved to supply them. The relevant dynamic here is not internal to Congress; it is between Congress and the public. That is to say, it involves

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Peter Baker, *A White House Aware of Second-Term Perils*, N.Y. TIMES, Jan. 20, 2013, at A16 (internal quotation marks omitted).

46 See Farrell et al., *supra* note 38.

47 Bresnahan et al., *supra* note 34.

48 See Nelson D. Schwartz & Jonathan Weisman, *Unlikely Backers in a Battle Over Taxes*, N.Y. TIMES, Dec. 12, 2012, at B1 (noting the Business Roundtable's dropping of its opposition to tax increases).

49 See Mike Dorning, *Obama Wins Almost 50% Republicans on Tax Mandate in Poll*, BLOOMBERG (Dec. 11, 2012, 8:00 PM), <http://www.bloomberg.com/news/2012-12-12/obama-wins-almost-50-republicans-on-tax-mandate-in-poll.html>; *Obama Tops Boehner on Budget Talks, With Much Broader Core Support*, ABC NEWS/WASH. POST POLL, Dec. 12, 2012, available at <http://www.langerresearch.com/uploads/1144a5FiscalCliffNegotiations.pdf>; *As Fiscal Cliff Nears, Democrats Have Public Opinion on Their Side*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (Dec. 13, 2012), <http://www.people-press.org/2012/12/13/as-fiscal-cliff-nears-democrats-have-public-opinion-on-their-side/>.

50 Cf. Bresnahan et al., *supra* note 34 ("[A] president fresh off a strong reelection victory tested—and ultimately broke—the Republican Party's fidelity to its tax-cuts-only governing philosophy."); Farrell et al., *supra* note 38 ("Republicans in Congress are not going to make these decisions because they are suddenly persuaded by the president. They are going to make these decisions because they've decided it's in their political interest to do so," a White House official said.).

51 See *supra* notes 39–40 and accompanying text.

52 Cf. Weisman, *supra* note 20, at A1 (noting House Majority Leader Eric Cantor's change of tone in the wake of the 2012 election results).

members' engagement in what David Mayhew has described as the "public sphere."<sup>53</sup>

The remainder of this Essay will sketch the contours of this engagement and its relationship to gridlock. Part I will discuss generally the nature of congressional gridlock. In particular, it will argue that we err in focusing on gridlock as a phenomenon; what requires explanation is congressional action, not inaction. It will offer an understanding of congressional action focusing on the interaction between members of Congress and the public. Once we understand what is constitutionally necessary to motivate congressional action, we are then better situated to identify true dysfunctions. Part II will discuss one such dysfunction—the Senate filibuster—and will focus, again, on the ways in which it plays out in the public sphere.

### I. GRIDLOCK IN THE PUBLIC SPHERE

Gridlock is not a phenomenon. It is the absence of phenomena. Observers assert that gridlock exists in Congress when laws are not passed, nominees are not confirmed, treaties are not ratified, and so on. Gridlock, that is, is the name we give to the perpetuation of the status quo ante when we believe that perpetuation to be unwarranted.

This recognition of gridlock's basic nature comes with an important corollary: The antithesis of gridlock is *not* no-gridlock. Rather, the opposite of gridlock is the enactment of some specific policy or policies, the confirmation of some specific nominee or nominees, and so on. There may be widespread outrage about "gridlock," but unless there is sufficient consensus about what should be done, the status quo will—and should—endure.<sup>54</sup>

This point is often overlooked because political observers have a (perhaps natural) tendency to assume that there is widespread support for their preferred positions, engaging in what psychologists call "false consensus bias."<sup>55</sup> (One of the classic examples of false consensus bias is the quote

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53 DAVID R. MAYHEW, *AMERICA'S CONGRESS: ACTIONS IN THE PUBLIC SPHERE*, JAMES MADISON THROUGH NEWT GINGRICH 7–9 (2000) [hereinafter MAYHEW, *AMERICA'S CONGRESS*]; see also DAVID R. MAYHEW, *PARTISAN BALANCE: WHY POLITICAL PARTIES DON'T KILL THE U.S. CONSTITUTIONAL SYSTEM*, at xviii (2011) (describing the public sphere as "the idea that political activity takes place before the eyes of an appraising public—not in a Washington, D.C. realm that can be theoretically or empirically isolated.") [hereinafter MAYHEW, *PARTISAN BALANCE*]. Mayhew, of course, takes the phrase "public sphere" from Habermas. See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger trans., MIT Press 1989) (1962). In using the phrase as Mayhew does, I mean to remain agnostic on many of Habermas's particular historical and sociological claims.

54 This is a simple recognition that some degree of status quo bias is at the heart of all political systems. Indeed, it is hard to imagine what the alternative would be: random and unpredictable lurches between policies?

55 See generally Joachim Krueger & Russell W. Clement, *The Truly False Consensus Effect: An Ineradicable and Egocentric Bias in Social Perception*, 67 J. PERSONALITY & SOC. PSYCHOL. 596 (1994). For a legal application, see, e.g., Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 (2008).

often attributed to *New Yorker* film critic Pauline Kael: "I don't know how Richard Nixon could have won [in 1972] . . . I don't know anybody who voted for him."<sup>56</sup>) When this presumed widespread support fails to manifest in action, then, these observers explain it by positing some sort of institutional dysfunction—gridlock. As a candidate for a contemporary Kael, consider *New York Times* columnist (and Nobel laureate in economics) Paul Krugman, who has repeatedly blamed congressional dysfunction and gridlock for poor economic policy,<sup>57</sup> presumably on the assumption that it could be nothing other than procedural roadblocks that are responsible for the failure to enact more Keynesian stimulus. Fiscal stimulus may well have been a *good* idea when Krugman was proposing it, but it certainly was not a *popular* idea.<sup>58</sup> Krugman may not know any people who would vote against stimulus, but they're out there in large numbers—indeed, in large enough numbers to make the word "stimulus" politically toxic<sup>59</sup> and to prevent legislative action on a large new stimulus package.

If, unlike Krugman, we focus on the conditions sufficient to motivate legislative action in our constitutional system, then we will be better positioned to see whether that system really has broken down. In other words, we

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56 Some version of this line is quoted with regularity. See, e.g., Mark Bauerlein, *Liberal Groupthink is Anti-Intellectual*, CHRON. OF HIGHER EDUC., Nov. 12, 2004, Chronicle Review, at 6; Solan et al., *supra* note 55, at 1280. In fairness to Kael, her actual remark seems to have been significantly more self-aware (and perhaps more condescending, as well): "I live in a rather special world . . . I only know one person who voted for Nixon. Where they are I don't know. They're outside my ken. But sometimes when I'm in a theater I can feel them." Israel Shenker, *2 Critics Here Focus on Films as Language Conference Opens*, N.Y. TIMES, Dec. 28, 1972, at 33. But even if the usually attributed line is not quite accurate, it *should* be. It's hard to imagine a more succinct illustration of the false consensus bias.

57 See Paul Krugman, Op-ed., *Plutocracy, Paralysis, Perplexity*, N.Y. TIMES, May 4, 2012, at A29; Paul Krugman, Op-ed., *No, We Can't? Or Won't?*, N.Y. TIMES, July 11, 2011, at A19; Paul Krugman, Op-ed., *Now That's Rich*, N.Y. TIMES, Aug. 23, 2010, at A23.

58 See John Harwood, *Obama's Crucible Moment at Intersection of Politics and the Economy*, N.Y. TIMES, July 30, 2011, at A16 (finding "negligible political appetite for new stimulus spending"); Jennifer Steinhauer, *Democrats are Warming to Obama Connection*, N.Y. TIMES, March 9, 2012, at A14 (referring to the early 2009 economic stimulus package as one of the primary "issues that have dogged Democrats" in the 2010 and 2012 elections). Indeed, opposition to the 2009 stimulus seems to have been a significant factor in Republican success in the 2010 congressional elections. See, e.g., Kim Severson, *More Resigned Than Angry, Voters Seek a Fix for the Economy*, N.Y. TIMES, Nov. 3, 2010, at P1 (noting that many voters saw those who supported the stimulus "as clear villains").

Krugman's faulting of gridlock for economic policies he dislikes is especially perplexing in light of the European experience. After all, in a Westminster-style system, the 2010 elections would have resulted in Republican control of the entire federal policy-making apparatus, and the Republicans ran on the platform of an economic austerity program aimed at reducing budget deficits. Indeed, several center-right European governments implemented austerity programs in recent years, and one of their fiercest critics has been Paul Krugman. See, e.g., Paul Krugman, Op-ed., *Looking for Mister Goodpain*, N.Y. TIMES, Feb. 1, 2013, at A27; Paul Krugman, Op-ed., *Europe's Austerity Madness*, N.Y. TIMES, Sept. 28, 2012, at A35; Paul Krugman, Op-ed., *The Austerity Agenda*, N.Y. TIMES, June 1, 2012, at A27.

59 See MICHAEL GRUNWALD, *THE NEW NEW DEAL* 447–48 (2012).

will better be able to distinguish between legislative inaction resulting from the lack of an adequate public consensus behind a particular course of action, on the one hand, and legislative inaction resulting from some procedural roadblock or dysfunction internal to our political institutions, on the other.

What requires explanation, in short, is not gridlock, but *action*. And two points should be made clear. First, there is no magical, frictionless mechanism for converting public opinion into policy. Indeed, there is no such thing as public opinion, distinct from policy; both are endogenous to the political process.<sup>60</sup> Political actors attempt to gauge and react to public opinion (why is why, for example, many congressional Republicans changed their tune immediately after the 2012 elections made it clear that the public was not behind them<sup>61</sup>), but they also attempt to steer and shape public opinion (which is why, for example, President Obama continued campaigning for his preferred policies even after the election<sup>62</sup>). Politics is nothing if not dialogic. Institutional structures both participate in the development of opinion formation and affect the terms on which opinion is translated (or not) into policy. What form public consensus must take before it translates into political action is a function of a political system's constitutional regime.

And this leads to the second point: The United States federal government has a relatively more cumbersome process for enacting laws than most other democracies. Not only does lawmaking require bicameralism and presentment, but it is also the case that the three actors—House, Senate, and President—have different electoral cycles and different (but cross-cutting) constituencies, making it likely that, at any given time, power will be shared by actors with markedly different agendas. Our staggered electoral system means that a single election—even a single “transformative” election—is unlikely to result in unified government.<sup>63</sup> The 1994 “Republican Revolution” swung both houses of Congress, but not the presidency, because 1994

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60 See MAYHEW, *AMERICA'S CONGRESS*, *supra* note 53, at 14–19 (noting that members of Congress shape, as well as reflect, public opinion); MAYHEW, *PARTISAN BALANCE*, *supra* note 53, at 57 (noting that presidents behave similarly); cf. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70, 89 (2012) (noting, in the context of congressional rules, that “the rules help to form preferences”).

61 See *supra* text accompanying notes 42–44.

62 See *supra* text accompanying notes 45–47.

63 I use the term “unified government” here to refer to control by a single political party of the House, the Senate, and the presidency. Three caveats are in order. First, because of the routinization of the filibuster, it is arguably the case that achieving unified government in practice requires a Senate supermajority, as well as the presidency and a House majority. As I have written elsewhere, I think this supermajoritarianism is unconstitutional, but it is hard to deny that it is how the Senate currently operates. See generally Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 *CONN. L. REV.* 1003 (2011). I will discuss the filibuster in more detail in Part II, *infra*. Second, party discipline is by no means absolute in Congress, and therefore the unity of unified government is always a matter of degree. And third, a full account of national policymaking would have to include the courts, as well; good-behavior tenure for judges means that changing the partisan composition of the judiciary requires an especially durable hold on power. It should be noted that

was not a presidential election year. Only if the Republicans had been able to continue making a successful public case through the 1996 elections would they have been able to achieve unified government. Unified government under President George W. Bush did not arise *ex nihilo*—Republicans had held both houses of Congress (more or less) since 1995.<sup>64</sup> Likewise, the 2008 elections resulted in unified government for two years, but that was a consequence of the 2006 Democratic takeover of both houses of Congress. At Westminster, achieving unified government requires convincing a plurality of voters in a majority of constituencies to cast a single vote for an MP of your party. In Washington, that will get you a House majority, but nothing more. You also need the voters to cast a second ballot for a Senator of that party—and (barring a vacancy-necessitated special election) they will have the opportunity to vote for, at most, one of their Senators in any given election cycle. And you need their vote in the presidential election, assuming it is a presidential election year, which it will not be in half of all House election years. A lot can interfere with this: Voters may split their tickets; they may change their preferences between election cycles; and the cross-cutting nature of the constituencies may result in different outcomes (e.g., a state with a majority of Democrats—and which therefore sends Democrats to the Senate and the electoral college—may be districted in such a way as to send more Republicans to the House than Democrats<sup>65</sup>). To put it succinctly, unified government in America requires a relatively broad, deep, and durable commitment by the electorate to the agenda of one of the parties.<sup>66</sup> Because

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each of these three caveats makes a highly unified government even harder to achieve, thereby strengthening the general point above.

64 More precisely, Republicans held both houses from 1995 to 2001. The 2000 elections resulted in a 50-50 split in the Senate, so there was a Democratic majority from January 3 to January 20, 2001 (i.e., as long as Al Gore remained Vice President), which then became a Republican majority on January 20 with the installation of Dick Cheney as President of the Senate. On June 6, 2001, Jim Jeffords of Vermont left the Republican Party and became an independent who caucused with the Democrats, returning the majority to them. In the 2002 elections, Republicans regained a slim majority in the upper chamber, which they lost in the 2006 elections.

65 This particular hurdle to achieving unified government could be surmounted by holding at-large elections for Representatives in each state, but federal law prohibits this. See 2 U.S.C. § 2c (2006).

66 It is for this reason that I do not share the concern that the Madisonian separation-of-powers system was “overwhelmed . . . almost from the outset” by the development of political parties. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 443 (2012) (“[T]he Madisonian model of interbranch rivalry is especially inaccurate during times of unified government.”); David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 602 (2009) (“[W]hen one political party captures all of the levers of power, then the American system of separation of powers fails.”). As I have argued elsewhere, this view treats the issue of unified versus divided government as an independent variable and then looks to see what each possible value of this variable implies for constraints on the executive. But unified versus divided government is more properly understood as a dependent variable—dependent,

the parties have strong incentives to compete for the center, unified government will be the exception.<sup>67</sup> And under divided government, power is shared among actors with different values, goals, and agendas. This is baked into our constitutional structure.

Of course, there are those who argue that this constitutional structure itself is the problem, that a move to something more like a Westminster system would be preferable.<sup>68</sup> I largely (but not entirely) disagree; I think that the American system broadly has the effect of promoting extensive and salutary public deliberation before significant legislative action can be taken. This Essay, however, is not the place to go into that discussion.<sup>69</sup> For purposes of this piece, I take our basic constitutional structure as given—both because it is unlikely to change any time soon and, more importantly, because it has not changed any time in the recent past. If the premise of the recent *Sturm und Drang* about gridlock is that it represents something new in our politics, then longstanding structures cannot be responsible.

But, as noted above, it is not gridlock that requires explanation. Gridlock is simply the perpetuation of the status quo; it is inertial. Action requires explanation—this is why this Essay began with two case studies of legislative action. So, how is it that, despite our constitutional structure, legislative action can and does take place? Broadly speaking, we can break this down into two scenarios—one for unified government, and one for divided government. Sometimes, we get legislative action because one party has managed to convince the public, across several election cycles, across large swaths of the country, and across different institutions, that it should be trusted with the reins of power. In other words, sometimes we do wind up with unified government, which allows the party in power to enact significant portions of its agenda. This is precisely what happened during the 111th

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that is, on the will of the people, as expressed through electoral mechanisms. Because of all of the hurdles discussed above, and because parties have a strong incentive over time to moderate positions that are out of the mainstream, we will frequently have divided government, and under those conditions, each institution will be able to check the others. Where we see unified government, it is evidence that one party has overcome all of the hurdles; it is evidence, in other words, that the public prefers one party to the other, across several election cycles and cross-cutting constituency structures. In that case, it would seem to be a democratic feature of the system, not a bug, that the institutional checks on that party's ability to enact its agenda are weaker. See Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1124 n.242 (2011).

67 The canonical work on the prevalence and workings of divided government remains DAVID R. MAYHEW, *DIVIDED WE GOVERN* (2d ed. 2005).

68 See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006); Sanford Levinson, *Has the Obama Presidency Vitiating the "Dysfunctional Constitution" Thesis?*, 43 CONN. L. REV. 985 (2011); Theodore J. Lowi, *Constitutional Merry-Go-Round*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 189 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); Louis Michael Seidman, *Let's Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19.

69 That discussion is one subject of my current book project. Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* ch. 2 (unpublished manuscript under contract with Yale University Press) (on file with author).

Congress (2009–11). As noted above, the Democrats had taken control of both houses of Congress in the 2006 elections; in 2008, they both won the presidency and substantially increased their margins in both houses. And the 111th Congress was tremendously prolific. A very abbreviated list of its major accomplishments includes legislation making it easier for plaintiffs to recover in instances of pay discrimination;<sup>70</sup> a massive fiscal stimulus that had the collateral effect of advancing a wide range of domestic policy goals;<sup>71</sup> the largest expansion of the social safety net since (at least) the Great Society, in the form of the provision of near-universal health insurance;<sup>72</sup> a massive restructuring of student loans;<sup>73</sup> the largest overhaul of financial regulation since the Great Depression;<sup>74</sup> a significant reduction in the crack-cocaine sentencing disparity;<sup>75</sup> the repeal of the military's "Don't Ask, Don't Tell" policy regarding homosexual service members;<sup>76</sup> the most sweeping reform of food safety laws in decades;<sup>77</sup> and the ratification of a major nuclear arms reduction treaty.<sup>78</sup> Whatever one thinks about the policy merits of particular items on that list, it is hard to describe the output as anything less than substantial.

Of course, such a substantial legislative output runs the risk of backlash. Dissatisfaction with some of the items on that list, as well as the continuing effects of a poor economy, contributed to Republican success in the 2010 congressional elections, and we returned to divided government in the 112th Congress, a state that persists into the 113th. So, how does congressional action occur under divided government? The first, and most obvious, thing to note is that we get significantly less congressional action under conditions of divided government than under conditions of unified government. It should not surprise us that the 112th Congress was less productive than the 111th. Nor, I think, should it dismay us—after all, the lesson of the 2010 elections was that there no longer existed widespread support for the Democratic legislative agenda. But 2010, like 1994, was just one election cycle,

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70 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

71 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009). On the Act's implications across a wide range of policy areas, see generally GRUNWALD, *supra* note 59.

72 Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 1001–1501, 2301–03, 124 Stat. 1029, 1030–70, 1081–83 (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). On the passage and impact of healthcare reform, see generally STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL (2010).

73 Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2001–2213, 124 Stat. 1029, 1071–81 (2010).

74 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

75 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

76 Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

77 FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011).

78 Treaty on Measures for Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. Treaty Doc. No. 111-5.

insufficient on its own to signal the sort of broad, deep, and temporally extended public preferences that could be said to constitute a mandate for the Republican agenda. To put it succinctly, there was significantly less democratic impetus for specific legislative actions in the 112th Congress than in its predecessor; as a result, the phenomenon of legislative action became rarer, and dismayed observers dubbed this (relative) paucity of action “gridlock.”

But the second thing to note is that we do, in fact, get some things done under divided government. Sometimes, this is because legislative action, although important, is either uncontroversial or is controversial in ways that do not track party lines. This, I think, explains why the 112th Congress was able to completely overhaul the patent system,<sup>79</sup> to remove the word “lunatic” from the United States Code,<sup>80</sup> and to pass significant free-trade agreements with Korea,<sup>81</sup> Colombia,<sup>82</sup> and Panama.<sup>83</sup> It may also explain why, in its first months, the 113th Congress has reauthorized the Violence Against Women Act<sup>84</sup> and passed legislation designed to strengthen the government’s ability to respond to public health emergencies.<sup>85</sup> Many other issues, however, do roughly track party lines. For those issues, when they are acted upon by Congress in divided government, it is because there is clear public appetite for doing so, and because both parties fear the consequences of being seen as holding up progress on the issue. Consider again the passage of the 2012 continuing appropriations resolution and the 2013 “fiscal cliff” tax deal. The debate over government finances had been playing out in the public sphere, and the public had come to some fairly stable, if not radical, conclusions: There was little public appetite for a government shutdown or for a tax deal that did not raise rates on the highest income brackets. Republican intransigence on these issues—either forcing a government shutdown or holding all of the Bush tax breaks hostage to the highest income brackets—was likely, under present circumstances, to result in House Republicans’ shouldering a disproportionate share of the opprobrium.<sup>86</sup> Perceiving these facts, leadership in both parties, and especially in the Republican Party, leaned on their rank-and-file to agree to compromises. The same public

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79 Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

80 21st Century Language Act of 2012, Pub. L. No. 112-231, 126 Stat. 1619 (2012).

81 United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, 125 Stat. 428 (2011).

82 United States-Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, 125 Stat. 462 (2011).

83 United States-Panama Trade Promotion Agreement Implementation Act, Pub. L. No. 112-43, 125 Stat. 497 (2011).

84 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013). For a discussion of the Act’s passage, see Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES, Mar. 1, 2013, at A13.

85 Pandemic and All-Hazards Preparedness Reauthorization Act of 2013, Pub. L. No. 113-5, 127 Stat. 161 (2013).

86 See *supra* notes 15–25, 42–50 and accompanying text.



dynamic is visible in Cantor's explanation for the passage of the JOBS Act.<sup>87</sup> This phenomenon is visible both in the immediate run-up to an election (as with the continuing appropriations bill) and in the aftermath of one (as with the tax deal); indeed, within hours after the 2012 election, Republican leaders were also talking about passing comprehensive immigration reform,<sup>88</sup> a push that has continued into the 113th Congress.<sup>89</sup> Of course, it remains to be seen how these issues will continue to play out over the course of the current Congress, but the key point is simply that the explanation for congressional action, if and when it comes, will have to do with members' engagement with the electorate.

And the flip side of that observation is that, where there is widespread public disagreement or uncertainty as to a particular course of action, we should not expect to see that action coming out of Congress. At any given time, there will be certain issues on which public consensus is emerging—I think we can probably put gay rights into this category<sup>90</sup>—and others on which we remain deeply divided—for example, issues surrounding government spending and the national debt. The former tend to fade from salience (there have been no widespread calls to reenact “Don’t Ask, Don’t Tell,” for example), while the latter remain in the political foreground. And to the extent that the public remains polarized about an issue, there is simply no public impetus for a particular policy. Widespread complaints about gridlock may be matched by equally broad, or even broader, complaints about any particular policy proposal. Only in the grip of false consensus bias could we automatically translate widespread complaints about “the deficit” or “jobs” or “the economy” into a widespread consensus in support of a particular legislative solution. Where no such consensus exists, we simply should not

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87 See *supra* text accompanying notes 20–22.

88 See Peter Nicholas, *Republicans Reconsider Immigration Laws*, WALL ST. J., Nov. 9, 2012, at A8; Jennifer Steinhauer, *Speaker ‘Confident’ of Deal with White House on Immigration*, N.Y. TIMES, Nov. 9, 2012, at A3. Importantly, this change has been driven, not just by Republican congressional leadership, but by conservative opinion-leaders. See, e.g., Eliza Gray, *Fox’s Own Border War*, NEW REPUBLIC, Feb. 25, 2013, at 5 (describing Fox News CEO Roger Ailes’s advocacy of a path to citizenship for undocumented immigrants); Charles Krauthammer, *The Way Forward*, WASH. POST, Nov. 9, 2012, at A29 (“For the party in general, however, the problem is hardly structural. It requires but a single policy change: Border fence plus amnesty. Yes, amnesty. Use the word. Shock and awe—full legal normalization (just short of citizenship) in return for full border enforcement.”); Mackenzie Weinger, *Hannity: I’ve ‘Evolved’ on Immigration and Support a ‘Pathway to Citizenship’*, POLITICO (Nov. 8, 2012, 6:32 PM) <http://www.politico.com/blogs/media/2012/11/hannity-ive-evolved-on-immigration-and-support-a-pathway-149078.html> (reporting radio host Sean Hannity’s conversion to supporting immigration reform).

89 See Ashley Parker & Michael D. Shear, *G.O.P. Opposition to Migrant Law is Falling Away*, N.Y. TIMES, Mar. 20, 2013, at A1; Julia Preston, *Senators Offer a New Blueprint for Immigration*, N.Y. TIMES, Jan. 28, 2013, at A1.

90 See Laurie Goodstein, *Christian Right Failed to Sway Voters on Issues*, N.Y. TIMES, Nov. 10, 2012, at A1.

expect to see any new policy enacted.<sup>91</sup> And this, of course, also explains why, despite the fervent hopes of many in the commentariat, the fiscal cliff negotiations did not lead to a “grand bargain” on taxing and spending.<sup>92</sup> There was consensus that we should not seriously curtail economic growth with large and indiscriminate tax hikes given the economy’s precarious state, and there was consensus that the very wealthy should be made to pay higher taxes. But deep dissensus remains on the underlying issues of the appropriate levels of domestic and military spending, the proper extent of the social safety net, and the amount of long-term public debt that is sustainable. Instead of making a grand bargain, we muddle through. And, to the extent that we care about democracy, this seems appropriate: We should not want to see policies enacted where there is a widespread belief that the status quo is preferable to those specific policies.

In short, in order to know whether the “gridlock” that political observers are experiencing at any given moment is evidence of systemic dysfunction, we need to know whether there exists a sufficient public consensus around a particular course of action. In this context, “sufficient” means that the consensus is adequate to satisfy the Constitution’s deliberation-forcing structure. If we are to take that structure as given, then, before we declare legislative inaction to be a sign of dysfunction, we should first be sure that the conditions sufficient to trigger legislative *action* have been met.

This is, of course, a difficult inquiry, highly dependent on context. Consensus sufficient to motivate legislative action can take the form of a consensus on a particular point (e.g., homosexuals should be allowed to serve openly in the armed forces), or it can take the form of a range within which overlapping consensus is possible (e.g., it is very important that the government not shut down, so any deal within certain broad parameters that prevents that from happening is preferable to the absence of a deal). The consensus is mediated by our representative institutions, and institutional actors play a role in constructing the consensus as well as in reflecting it. Political leaders work assiduously to convince the public—both the mass public and elite sub-groups within it—to support their positions. This constant contestation in the public sphere will sometimes result in sufficient consensus around a particular course of action, and that course will be undertaken. And sometimes, it will not, and the status quo will endure. Moreover, precisely because of the dialogic nature of political interaction, this consensus can be very difficult to measure. Because political opinion is endogenous to politics, snapshot polling does not suffice—although it is clearly a useful indicator, it can fail to capture nuances like the intensity and durability with which views are held, the degree to which those views are still malleable, the

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91 See Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 581 (2012) (book review) (“The public is divided on major policy issues, especially at the extremes, and Congress’s stalemate reflects those divisions.”); Gerard N. Magliocca, *Don’t Be So Impatient*, 88 NOTRE DAME L. REV. 2157, 2161 (2013) (“Congress cannot get many things done because the voters that they represent do not agree on what should be done.”).

92 See, e.g., Jennifer Steinhauer, *No Era for Grand Deals*, N.Y. TIMES, Jan. 1, 2013, at A1.

extent to which elite and mass opinion are aligned, any momentum in one direction or another, and so on. The best way to capture the richness of political interactions is through interpretive case studies—which is precisely why this Essay began with two such case studies. Reasonable political interpreters may well disagree with my conclusions about what, exactly, these case studies demonstrate—but that, at least, will be the right discussion to have. We may simply declare the absence of legislative action to be “gridlock,” but without some evidence that a widespread public consensus around a particular course of action has failed to result in action, we should hesitate to describe it as democratically dysfunctional.

## II. THE FILIBUSTER IN THE PUBLIC SPHERE

As an example of a procedural mechanism that *does* frustrate broad, deep, and durable public consensus, consider the Senate filibuster. As I have noted elsewhere, the modern filibuster is best described as a simple supermajority requirement for the undertaking of almost any business in the Senate.<sup>93</sup> The filibuster does raise the troubling possibility of legislative inaction despite a public consensus, of the form anticipated in the Constitution, for a specific course of action.

But why view the filibuster as any different from any of the other ground rules? I have noted above that the form of public consensus that our constitutional order requires as a spur to legislative action is more elaborate than that required by other constitutional orders.<sup>94</sup> Why not simply view the filibuster as just another piece of that structure, another aspect of the particular type of consensus required by our constitutional system? In other words, why isn't the sixty-vote Senate simply another piece of what it means for a consensus to be constitutionally adequate to produce legislative action?

Of course, one answer is simply that the other aspects of that structure, discussed above, arise out of constitutional text; the filibuster does not.<sup>95</sup> Indeed, the rise of the modern filibuster—that is, the requirement that nearly every significant measure must have at least sixty votes to get through the Senate—is quite a recent phenomenon.<sup>96</sup> To the extent, then, that recent concern about gridlock and dysfunction presupposes that these symptoms are relatively new arrivals on the political scene, the filibuster is a better candidate for the underlying cause than constitutional structures that have been around for quite some time.

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93 See Chafetz, *supra* note 63, at 1006–11; Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENUMBRA 245, 247–48 (2010), <http://www.pennumbra.com/debates/pdfs/Filibuster.pdf>.

94 See *supra* text accompanying notes 63–68.

95 In fact, I have argued elsewhere that the modern filibuster is unconstitutional. See Chafetz, *supra* note 63; Chafetz & Gerhardt, *supra* note 93, at 246–52, 258–62. Nothing in this Part, however, hinges on that argument.

96 See Chafetz, *supra* note 63, at 1008–11 (describing, and offering hypotheses to explain, the rise of the sixty-vote Senate); *id.* at 1017–28 (rejecting claims of a distinguished historical pedigree for the modern filibuster).

But there is another, more important, reason that the filibuster is democratically dysfunctional, a reason sounding in the ways that it plays out in the public sphere. Put simply, the public is consistently not only tolerant but downright supportive of actions meant to circumvent the filibuster.<sup>97</sup> For example, when the filibuster prevented the passage of legislation meant to combat global warming, the Environmental Protection Agency increased its regulations of greenhouse gases, with strong public approval.<sup>98</sup> By contrast, consider the debt ceiling standoff, which involved a showdown between the House majority and the President. Even though commentators had proposed a number of (more or less) plausible legal mechanisms by which the President could unilaterally raise the debt ceiling,<sup>99</sup> Obama rejected them out of hand, explaining that “that’s not how our democracy works,” because “Americans made a decision about divided Government,”<sup>100</sup> one which he was bound to respect. But where the filibuster intervenes, the President feels no such public-respecting compunctions. Consider executive branch appointments: When filibusters prevented the confirmation of nominees to various Administration posts, President Obama used recess appointments, again without any sort of public outcry.<sup>101</sup> And when the Senate held pro forma sessions in an attempt to forestall recess appointments, the President took the unprecedented steps of declaring that a recess nevertheless existed and making recess appointments.<sup>102</sup> Defenders of these steps explicitly and repeatedly pointed to the use of the filibuster as justifying them.<sup>103</sup> Again, by contrast, it is difficult to imagine a president recess appointing a nominee

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97 The following discussion is a condensed version of Chafetz, *supra* note 2, at 761–68.

98 See *id.* at 762–64.

99 See, e.g., Jack M. Balkin, *3 Ways Obama Could Bypass Congress*, CNN.COM (July 28, 2011, 10:48 AM), <http://www.cnn.com/2011/OPINION/07/28/balkin.obama.options/index.html> (suggesting that the Treasury could mint trillion-dollar platinum coins or that it could sell the Federal Reserve an “exploding option” to purchase government property); Buchanan & Dorf, *supra* note 3, at 1188–94 (discussing the argument based on section 4 of the Fourteenth Amendment); *id.* at 1196–1217 (arguing that failure to raise the debt ceiling presented the President with a situation in which he had to choose among unconstitutional options and that in such a situation he was permitted to disregard the debt ceiling); Eric A. Posner & Adrian Vermeule, *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/22/opinion/22posner.html> (arguing that Obama should declare a Schmittian state of exception and raise the debt ceiling unilaterally).

100 Remarks at a Town Hall Meeting and a Question-and-Answer Session in College Park, Maryland, 2011 DAILY COMP. PRES. DOC. 7 (July 22, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201100516/pdf/DCPD-201100516.pdf>.

101 See Chafetz, *supra* note 2, at 764–65.

102 See *id.* at 765. The D.C. Circuit subsequently invalidated these appointments in a sweeping opinion, holding that recess appointments could only be made during intersession recesses. The existence of the pro forma sessions was thus irrelevant to the court’s holding. *Noel Canning v. Nat’l Labor Relations Bd.*, 705 F.3d 490, 499–514 (D.C. Cir. 2013) *cert. granted* 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281).

103 See Chafetz, *supra* note 2, at 766.

who had actually been voted down in the Senate.<sup>104</sup> The President's legal argument for unilaterally raising the debt ceiling was no less plausible than his argument for unilaterally declaring the Senate in recess. What differentiates the situations is the cause of the underlying legislative inaction.

This brings us back again to the public sphere. It has proven rhetorically powerful for a president to be able to say, "They wouldn't even give my nominee/this bill an up-or-down vote!" or "Forty-one senators out of a hundred should not be able to defeat this bill/nomination!" Public support for circumventing the filibuster—especially when contrasted with the political untenability of circumventing the House or decisions taken by a Senate *majority*—is a pretty good indication that the sixty-vote Senate is widely understood to frustrate constitutionally sufficient consensus for particular legislative actions. That is, the fact that people who would oppose recess appointment of a nominee who had been voted down support recess appointment of a filibustered nominee suggests that those people believe the filibuster to be adding one obstacle too many to legislative action. The requisite public consensus is there, but legislative action nevertheless fails to materialize. This is democratically dysfunctional gridlock.

My point here is certainly not that the filibuster is the only democratically dysfunctional aspect within our constitutional system. Rather, my aim here is to use the filibuster as an example of the sort of showing one ought to be able to make before claiming democratic dysfunction. When a bill falls prey to the filibuster, we can point to specific indicia of public sentiment, both institutional (i.e., the fact that the bill has the support of majorities in both houses plus presidential support) and more diffuse (i.e., the fact that, when other actors circumvent the filibuster in some way, there seems to be public support for their doing so), against the filibuster. If we are to decide that there are other dysfunctional mechanisms within our constitutional system, we should be able to point to similar indicia.

#### CONCLUSION

The primary aim of this Essay is positive, not normative.<sup>105</sup> My goal has been to offer an account of what is happening when political observers experience legislative gridlock. Gridlock, I have argued, is simply negative space; it is the term used to denote the absence of legislative action. Newton's First

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104 It would also be illegal for that recess appointee to draw a salary from the Treasury. See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. D, Title VII, § 709, 121 Stat. 1844, 2021 (2007) (codified at note preceding 5 U.S.C. § 5501) ("Hereafter, no part of any appropriation contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.").

105 Most especially, this Essay should not be read as a Panglossian claim that all is well in our constitutional order. Indeed, I think we currently suffer from serious separation-of-powers imbalances. See generally Chafetz, *supra* note 69; Chafetz, *supra* note 2. But before we claim that those imbalances are a function of "gridlock," we should be careful to understand what that means.

Law applies to politics as well as physics: What requires explanation is change, not the continuation of the status quo. It is only by better understanding the conditions necessary for legislative action in our system that we are better able to distinguish between (procedurally) worrisome and benign inaction.

One puzzle does, however, remain: Why do so many political observers seem to think that gridlock is worse now than it has been in the past?<sup>106</sup> This Essay has already offered one suggestion: The filibuster, which truly is dysfunctional, has become routinized in recent years in ways that it never was before.<sup>107</sup> But this cannot be the whole of the answer; the filibuster becomes less salient (although by no means irrelevant) when the primary friction is between the President and the House, as it has been since 2011. I will conclude by suggesting a few additional possibilities for why so many people currently think that gridlock is newly problematic. Some of these may indicate actual democratic dysfunctions, like the filibuster; others may not. I do not take a position on which, if any, of them are responsible for the perception of increased gridlock. This Essay will have accomplished its purpose if it helps us think through which of these suggestions, if correct, would be a sign of institutional dysfunction, and which would not.

First, it is possible that some observers are simply mistaken about the amount of legislative activity today, as against previous times. This could take the form of a sort of historical amnesia, pining for a lost mythical golden age of frictionless lawmaking. After all, complaints about the cumbersomeness of congressional procedure find one of their earliest airings in George Washington's dissatisfaction with the First Congress,<sup>108</sup> and it is certainly not unknown for observers, looking backward, to overstate the degree of harmony that existed at earlier times.<sup>109</sup> A related possible myopia would involve reading too much into a very short time period—it is true that, at least by some measures, the 112th Congress was historically unproductive,<sup>110</sup> but, as noted above, the 111th Congress was historically productive.<sup>111</sup> As of

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106 False consensus bias, *see supra* text accompanying notes 55–59, may explain why observers perceive dysfunction when there is none, but (unless the prevalence of false consensus bias is increasing over time) it cannot explain why *more* people seem to perceive dysfunction now than in the past.

107 *See* Chafetz, *supra* note 63, at 1008–11.

108 *See* THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES, in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791, at 128–31 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (Aug. 22, 1789, diary entry) (recounting the story of Washington coming to the Senate seeking advice and consent on a treaty, only to leave with a “discontented air” when the Senate would not vote).

109 *See* Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 761–67 (2011) (noting the critique and decline of the “consensus view” of American history).

110 *See* Thomas E. Mann & Norman J. Ornstein, Op-ed., *5 Myths About the 112th Congress*, WASH. POST, Jan. 6, 2013, at B3 (noting that the 112th Congress enacted “the smallest number of laws in modern history”).

111 *See supra* text accompanying notes 70–78.

this writing, it is unclear what the 113th Congress will bring;<sup>112</sup> perhaps observers are simply reading too much into a single Congress.

Alternatively, those asserting greater amounts of gridlock may be correct that less is happening, but it may not be institutionally dysfunctional. For instance, if the public itself is currently quite polarized,<sup>113</sup> then it would be hard to characterize a Congress that achieved little because it, too, was polarized as institutionally dysfunctional. What's more, to the extent that legislative harmony truly did persist in earlier eras, it is at least worth considering whether that harmony was itself a result of democratic dysfunction—a consequence of the marginalization of voices that are now able to speak more freely. And, to the extent that a poor economy makes political consensus more difficult (a big pie is easier to divide up than a small one, after all),<sup>114</sup> improving economic performance may suggest greater range for political action in the years to come.

None of the suggestions above would point toward institutional dysfunction (although some may, of course, point toward a larger cultural dysfunction). But there may be other reasons that observers perceive higher levels of gridlock that do, in fact, point to real democratic dysfunction. If it is true, for example, that a decline in fellow-feeling among legislators—perhaps caused by changes to the legislative work week or other factors<sup>115</sup>—has made them resistant to working together, even when their constituents have reached sufficient policy consensus, then this could potentially prevent that consensus from manifesting in legislative action. Similarly, if the combination of partisan primaries and bipartisan gerrymandering are resulting in a legislature that cannot be said to be broadly responsive to the American people,<sup>116</sup> then we may have identified a cause of actual democratic dysfunction.

As noted above, the principal aim of this Essay is not to take a stand on whether or to what extent gridlock exists or why so many observers, in fact,

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112 Even Mann and Ornstein think that “there are reasons to believe” that the 113th Congress will do more than the 112th. Mann & Ornstein, *supra* note 110, at B3.

113 This point is debated. Compare MORRIS P. FIORINA, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (3d ed. 2010) (arguing that the American public is not polarized on most issues), with ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010) (arguing that the American public is polarized), and Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276-81 (2011) (same). For a different perspective, see also Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405 (2012) (finding public polarization along affective, rather than ideological, lines).

114 See Annie Lowrey, *The Low Politics of Low Growth*, N.Y. TIMES, Jan. 13, 2013, at SR 5.

115 See, e.g., MANN & ORNSTEIN, *supra* note 11, at 146-69.

116 See Pildes, *supra* note 113, at 297-319 (arguing that both partisan primaries and bipartisan gerrymandering contribute to gridlock). But see John Sides & Eric McGhee, *Redistricting Didn't Win Republicans the House*, WASH. POST WONKBLOG (Feb. 17, 2013, 11:33 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/17/redistricting-didnt-win-republicans-the-house/> (arguing that incumbency effects, not gerrymandering, were largely responsible for Republicans' maintaining control of the House in the 2012 elections).

believe that it does. Rather, it is to clarify the nature of the question. For it is only by understanding what truly dysfunctional gridlock is (and is not) that we can hope to identify, and maybe even eliminate, it.